

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

NOU HER,

Petitioner,

v.

MENDOTA PRISON,

Respondent.

Case No. 1:23-cv-00272-CDB (HC)

FINDINGS AND RECOMMENDATION THAT  
THE PETITION FOR WRIT OF HABEAS CORPUS  
BE DISMISSED WITH PREJUDICE AND  
WITHOUT LEAVE TO AMEND

(Doc. 1)

TWENTY-ONE DAY DEADLINE.

Clerk of Court to randomly assign District Judge

Petitioner Nou Her (“Petitioner”), a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. (Doc. 1). A preliminary screening of the petition reveals it should be dismissed as the petition does not fall within the core of habeas corpus.

**Preliminary Screening**

Rule 4 of the Rules Governing § 2254 Cases requires the Court to conduct a preliminary review of each petition for writ of habeas corpus.<sup>1</sup> *Pro se* habeas corpus petitions are to be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). However, the Court must dismiss a petition “[i]f it plainly appears from the petition...that the petitioner is not entitled to relief.” Habeas

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<sup>1</sup> The Rules Governing § 2254 cases in the United States Courts (Habeas Rules) are appropriately applied to proceedings undertaken pursuant to 28 U.S.C. § 2241. Habeas Rule 1(b).

1 Rule 4. Habeas Rule 2(c) requires that a petition 1) specify all grounds of relief available to the  
2 Petitioner; 2) state the facts supporting each ground; and 3) state the relief requested. Notice pleading  
3 is not sufficient; rather, the petition must state facts that point to a real possibility of a constitutional  
4 error. *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (“Habeas Corpus Rule 2(c) is more demanding”).  
5 Allegations in a petition that are vague, conclusory, or palpably incredible are subject to summary  
6 dismissal. *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990). A petition for habeas corpus  
7 should not be dismissed without leave to amend unless it appears that no tenable claim for relief can  
8 be pleaded were such leave to be granted. *Jarvis v. Nelson*, 440 F.2d 13, 14 (9th Cir. 1971) (per  
9 curiam).

10 **The Petition**

11 Prior to 2023, Petitioner alleges his jaw was broken in “[five] different places.” (Doc. 1 at 1).  
12 Petitioner claims his lower jaw was held together by wire to keep his jawbone in place. *Id.* In January  
13 2023, Petitioner purports he was called to dental at FCI Mendota to extract several of his rear teeth  
14 because of his broken jaw. *Id.* Petitioner notes Dr. Moon, a private contractor, performed the  
15 extraction. *Id.* at 1-2.

16 Petitioner alleges during the extraction, Dr. Moon “cut the wire which held my jaw together,  
17 presumably to facilitate a less difficult extraction”. *Id.* at 1. Petitioner claims Dr. Moon denied  
18 cutting the wire holding his jaw together. *Id.* at 2. Petitioner asserts he is in extreme pain because of  
19 Dr. Moon’s alleged actions. *Id.* at 2. Petitioner contends he sought administrative relief but “no reply  
20 was forthcoming.” *Id.* Petitioner claims his future “specialist appointments [regarding his] jaw” have  
21 been canceled. *Id.*

22 On February 23, 2023, Petitioner filed the instant petition. (Doc. 1). Petitioner argues his  
23 confinement is unconstitutional pursuant to 28 U.S.C. § 2241. *Id.* at 3. Specifically, Petitioner avers  
24 Dr. Moon and BOP’s conduct amounts to cruel and unusual punishment and deliberate indifference in  
25 violation of the Eighth Amendment, negligence, and medical malpractice. *Id.* Petitioner requests the  
26 Court order BOP to provide him with medical relief. *Id.* at 3.

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1     **Discussion**

2           Petitioner has failed to state a cognizable federal habeas claim. Federal law allows two main  
 3 avenues for relief on complaints related to imprisonment: a petition for habeas corpus, and a complaint  
 4 under 42 U.S.C. § 1983. *Muhammad v. Close*, 540 U.S. 749, 750 (2004) (per curium). Habeas corpus  
 5 is the appropriate remedy for challenges to the validity of the fact or length of confinement or matters  
 6 affecting the duration of confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 500 (1973). If a favorable  
 7 challenge would not “necessarily lead to [a petitioner’s] immediate or earlier release from  
 8 confinement,” the claim does not fall within “the core of habeas corpus.” *Nettles v. Grounds*, 830 F.3d  
 9 922, 935 (9th Cir. 2016). Instead, requests for relief turning on circumstances of confinement may be  
 10 presented in a § 1983 action. *Muhammad*, 540 U.S. at 750; *see Ramirez v. Galaza*, 334 F.3d 850, 859  
 11 (9th Cir. 2003) (“habeas jurisdiction is absent, and a § 1983 action is proper, where a successful  
 12 challenge to a prison condition will not necessarily shorten the prisoner’s sentence.”).

13           Here, Petitioner alleges cruel and unusual punishment and deliberate indifference in violation  
 14 of the Eighth Amendment, negligence, and medical malpractice. *See generally* (Doc. 1). These  
 15 claims relate to the conditions of Petitioner’s confinement rather than its legality. An appropriate  
 16 remedy for these claims, if proven, would be in the form of damages or a change in conditions, not  
 17 release. Indeed, Petitioner requests the Court order BOP to provide him medical relief not release. *Id.*  
 18 at 3. Thus, Petitioner’s claim is not cognizable in a federal habeas corpus proceeding.

19           The claims raised in the petition may be cognizable if raised in a § 1983 civil rights action.  
 20 When a habeas petition “is amenable to conversion on its face, meaning that it names the correct  
 21 defendants and seeks the correct relief, the court may recharacterize the petition so long as it warns the  
 22 *pro se* litigant of the consequences of the conversion and provides an opportunity for the litigant to  
 23 withdraw or amend his or her complaint.” *Nettles*, 830 F.3d at 936 (quoting *Glaus v. Anderson*, 408  
 24 F.3d 382, 388 (7th Cir. 2005)).

25           Habeas actions and § 1983 prisoner civil right cases “differ in a variety of respects—such as  
 26 the proper defendant, filing fees, the means of collecting them, and restrictions on future filings—that  
 27 may make recharacterization impossible or, if possible, disadvantageous to the prisoner compared to a  
 28 dismissal without prejudice of his petition for habeas corpus.” *Id.* at 935-36 (citations omitted);

1     *United States v. Seesing*, 234 F.3d 456, 464 (9th Cir. 2000) (courts should not recharacterize a  
2 prisoner's *pro se* filing as a federal habeas petition when doing so may be to the prisoner's  
3 disadvantage). For instance, the filing fee for a habeas petition is \$5, and if leave to proceed *in forma*  
4 *pauperis* is granted, as it has been here, the fee is forgiven. For civil rights cases, however, the fee is  
5 \$400 and under the Prison Litigation Reform Act the prisoner is required to pay \$350, even if granted  
6 *in forma pauperis* status, by way of deductions from the income to the prisoner's trust account. *See* 28  
7 U.S.C. § 1915(b)(1). A prisoner who might be willing to file a habeas petition for which he or she  
8 would not have to pay a filing fee might otherwise forgo a civil rights complaint for which the fee  
9 would be deducted from income to his or her account. Also, a civil rights complaint that is dismissed  
10 as malicious, frivolous, or for failure to state a claim would count as a "strike" under 28 U.S.C. §  
11 1915(g), which is not true for habeas cases.

12       Based on these differences between habeas and civil rights cases, the Court will recommend  
13 that this petition be dismissed. Because it is apparent Petitioner cannot set forth a viable claim for  
14 relief, the petition will be dismissed without leave to amend. *Jarvis*, 440 F.2d at 14. Though the  
15 undersigned expresses no view regarding the merits of any such claim, Petitioner may file a claim  
16 pursuant to 42 U.S.C. § 1983 based on the allegations contained in the petition.

17 **Conclusion and Recommendation**

18       Accordingly, IT IS HEREBY ORDERED:

19       1. The Clerk of Court is DIRECTED to randomly assign a district judge to this action for the  
20 purposes of reviewing these findings and recommendations.  
  
21       2. The Clerk of Court is DIRECTED to send Petitioner one blank copy of the form complaint  
22 for 42 U.S.C. § 1983 civil rights action.

23       And IT IS HEREBY RECOMMENDED

24       1. The petition shall be DISMISSED without leave to amend for failure to state a habeas claim.  
  
25       These findings and recommendations will be submitted to the United States District Judge  
26 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty-one days of  
27 being served with these findings and recommendations, Petitioner may file written objections with the  
28 Court. The document should be captioned "Objections to Magistrate Judge's Findings and

1 Recommendations.” Petitioner is advised that failure to file objections within the specified time may  
2 result in the waiver of rights on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014)  
3 (citing *Baxter v. Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

4 IT IS SO ORDERED.

5 Dated: March 13, 2023

  
6 UNITED STATES MAGISTRATE JUDGE

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